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Supreme Court of the United States

OCTOBER TERM, 1991

DIAL INFORMATION SERVICES CORP. OF NEW YORK; FABULOUS ASSOCIATES, INC.; SOURCE COMMUNICATIONS, INC.; and TELE-PRO COMMUNICATIONS CORP.,

Petitioners,

—v.—

RICHARD THORNBURGH,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF PETITIONERS

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CONSENT OF THE PARTIES

The parties have consented to the filing of this brief. Their letters of consent are filed with the Clerk of this Court.

INTEREST OF AMICUS CURIAE

Lambda Legal Defense and Education Fund, Inc. ("LAMBDA"), appearing as amicus curiae, is a New York non-profit corporation, and is the country's oldest and largest national gay and lesbian legal rights advocacy organization. LAMBDA was organized in 1973 "to seek, through the legal process, to insure equal protection of the laws and the protection of civil rights of homosexuals" and in furtherance of that purpose, "to initiate or join in judicial and administrative proceedings whenever legal rights and interests of significant numbers of homosexuals may be affected."

LAMBDA Certificate of Incorporation, ¶ 2.2(a).

LAMBDA has appeared as counsel of record or as amicus curiae in numerous cases involving the legal rights of gay men and lesbians in state and federal courts throughout the country, including challenges to statutes that restrict the constitutional rights of lesbians and gay men, and in cases that have challenged laws, regulations, or private actions that discriminate against or restrict the basic civil rights of gay men and lesbians.

In accordance with its purposes, LAMBDA has a strong interest in this case. LAMBDA is particularly concerned about the far-ranging impact of the challenged statute on the First Amendment rights of gay men and women who utilize "adult-oriented" phone information

services. We are also deeply concerned about the challenged statute's impact on efforts to facilitate safer sexual practices to avoid the transmission of the human immunodeficiency virus (HIV), the virus associated with acquired immunodeficiency syndrome (AIDS). LAMBDA appeared as amicus curiae before the District Court in this case.

SUMMARY OF ARGUMENT[1]

In Sable Communications of California v. F.C.C., this Court reaffirmed that "[s]exual expression which is indecent but not obscene is protected by the First Amendment[.]" 109 S. Ct. 2829, 2837 (1989). Such expression is constitutionally protected as a valuable form of speech and association among free people. The phone services under attack here facilitate people's choice to engage in such protected speech and association in the privacy of their own homes and over their own telephones. Such speech is not the mere "indecent" sexual banter that the government seeks to portray, but to the contrary serves important functions

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1/ To avoid duplication, Lambda adopts the Statement of the Case in the Petition, and the First Amendment arguments set forth by Petitioners on standards for content-based regulation, vagueness, and prior restraint.

for many gay, disabled, and otherwise isolated individuals relating to the exchange of information, the pursuit of companionship, entertainment, and risk-free sexual satisfaction in the midst of the AIDS crisis.

In striking down a statute virtually identical to the one at issue here, the Court noted:

> Because the statute's denial of adult access to telephone messages which are indecent but not obscene far exceeds that which is necessary to limit the access of minors to such messages, we hold that the ban does not survive constitutional scrutiny.

Id. at 2839 (emphasis added). The instant statute -- the 1989 Amendment to the Communications Act of 1934, 47 U.S.C. §§ 223(b) and (c) (the "Helms Amendment") -- is merely the latest incarnation of the same unconstitutional governmental impulse to stifle so-called "indecent"

speech. Because it, too, "far exceeds that which is necessary" to achieve any legitimate and compelling state interest, this Court should strike it down.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

Point I

THE HELMS AMENDMENT SEEKS TO CURB EXPRESSION PROTECTED BY THE FIRST AMENDMENT RIGHTS OF FREE SPEECH AND ASSOCIATION AND THE RIGHT TO PRIVACY.

The telephone reaches into almost every American home and carries speech as freely as the air; consequently, the government's attempt here to control what Americans say to each other over the telephone threatens a massive and pervasive intrusion into privacy and First Amendment rights. As phone lines enter into nearly all American homes and offices, linking people throughout the nation, this statute, if allowed to stand, will send a chill into every

American household. Rather than people "reach[ing] out and touch[ing] someone," it is the government that will reach out and muzzle protected speech over phone wires.

A. The Telephone Plays a Unique Role in Society that Implicates a Range of First Amendment Interests.

A unique medium of communication and association, combining elements of expression and privacy in a form that nearly all Americans now take for granted, the telephone enables us to communicate with each other -- casually or intimately -- while never leaving the privacy of our homes. Personal and warm conversations, commercial speech, entertainment, even cries for help are all engaged in, privately, over the telephone. We inform, amuse, educate, and explain ourselves over the telephone, retaining control over whom we speak or

listen to, and when. Among the most valuable of the characteristics of telephone communication is the ability to converse intimately while retaining, if so desired, one's anonymity. Present technology, as offered by electronic publishers, information providers, and other speech-facilitating services, now permits anonymous discourse and association between like-minded people on topics of interest to them, without the need to leave the home or set foot in the street. Although a new technology, this means of communicating and associating retains core features protected by the First Amendment. Equally important, through the telephone, we need not expose ourselves to unwanted expression or association, for we can decline to pick up the phone, hang up, or, thanks to present technology now in place, block

access from our home phones to unwanted communication. Correspondingly, unconsenting others need never be exposed to our speech over the telephone.

B. Settled First Amendment Doctrine Establishes That Telephonic Communication is Constitutionally Protected.

This Court has long recognized that Americans have a "reasonable expectation of privacy" in their use of the telephone to speak and associate. Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). It is similarly well-settled that Americans have a privacy and First Amendment interest in having and using sexual material, even if obscene, in the privacy of their own homes. Stanley v. Georgia, 394 U.S. 557 (1969).[2/] Surely then, Americans have

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2/ Although a privacy case, the Court has acknowledged that Stanley "was firmly grounded in the First Amendment." Bowers v. Hardwick, 478 U.S. 186, 195 (1986).

reasonably come to expect that matters sexual discussed over the telephone in private, like protected speech in general in the home or on the phone, will not be intruded upon or interfered with by the government.

In Stanley, the Court declared that, "[i]f the first amendment means anything, it means that the state has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." The Court held it "wholly inconsistent with the philosophy of the first amendment" for the state to "exercise the power to control men's minds" or to seek "the right to control the moral content of a person's thoughts." Id. at 565-66. Certainly if the state may not control the moral content of a person's thoughts, it must be extremely circumspect in its efforts

to restrict the expression of such thoughts to others. In America, it is the individual, not the government, who decides to whom to speak or to listen. Stanley considered an intersection of rights to privacy and expression closely akin to those at issue here. As one federal court put it, rejecting an attempt at government censorship not dissimilar to the one proposed here:

> If the First Amendment "means that a state has no business telling a man, sitting alone in his own house what books he may read or what films he may watch," Stanley, then it certainly means that the state cannot censor or unreasonably burden the protected speech accessed or engaged in by adults vis-a-vis the telephone.

Fabulous Associates, Inc. v. Penn. Public Utility Comm'n, 693 F. Supp. 332, 337 (E.D. Pa. 1988) (citation omitted). As the American government refrains from censoring its citizens' private libraries or peering into their bedrooms, neither

should it seek to stifle their ability to converse privately about intimate matters. The legislation at issue before the Court, however, attempts to do just that.

The intersection of privacy and expression rights under the First Amendment also creates a "right of association" which is implicated in the present case. See, e.g., Karst, "The Freedom of Intimate Association," 89 Yale L.J. 624 (1980).[3/] "[T]he Bill of Rights . . . must afford the formation and preservation of certain kinds of highly personal relationships a

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3/ Professor Karst sets forth a number of values such intimate associations serve, including the opportunity to enjoy and benefit from social intercourse and companionship, and the opportunity for caring, commitment, and love. 89 Yale L.J. at 630-36. These are clearly the entitlement of free men and women. They are precisely what the services here facilitate, for some people almost indispensably.

substantial measure of sanctuary from unjustified interference by the State." Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984). Such "highly personal" or "intimate" associations have been carefully protected by the Supreme Court. See, e.g., City of Dallas v. Stanglin, 57 U.S.L.W. 4406 (Apr. 3, 1989) (distinguishing unprotected associations in public social halls from other more intimate ones).

In Stanglin, Chief Justice Rehnquist wrote for the Court:

> While the First Amendment does not in terms protect a "right of association," our cases have recognized that it does embrace such a right in certain circumstances. In Roberts, we noted two different sorts of "freedom of association" that are protected by the United States Constitution:
>
> > Our decisions have referred to constitutionally protected "freedom of association" in two distinct senses. In one line of decisions, the Court has

> concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty.

Stanglin, 57 U.S.L.W. at 4407 (emphasis added) (citation omitted). Although the Court in Stanglin held that "dance-hall patrons, who may number one thousand on any given night, are not engaged in the sort of 'intimate human relationships' referred to in Roberts," id. at 4407, it carefully preserved that protected sphere of association that more aptly characterizes the more intimate exchanges and encounters we engage in over the

telephone.[4/] Thus, the Helms Amendment implicates not just speech and privacy rights, but freedom of association as well.

C. The Services Provided by Petitioners Fulfill Important and Socially Useful Functions For Many Gay, Disabled, Or Otherwise Isolated Individuals.

The First Amendment protects adults in their right to engage in so-called "indecent" speech over the telephone regardless of any deeper social significance to that speech. See Action for Children's Television v. FCC, 852

4/ In his concurrence, Justice Stevens, joined by Justice Blackmun, observed that "the opportunity to make friends and enjoy the company of other people -- in a dance hall or elsewhere -- is an aspect of liberty protected by the Fourteenth Amendment." Stanglin, 57 U.S.L.W. at 4409. He concurred in the judgment because the city had "adequately justified the ordinance's modest impairment of the liberty of teenagers. Indeed . . . the ordinance actually gives teenagers greater opportunity to associate than they would have if the . . . provision were invalidated." Id. (emphasis added).

F.2d 1332, 1340 (D.C. Cir. 1988) ("Indecent but not obscene material . . . qualifies for First Amendment protection whether or not it has serious merit"). Even if the speech restrained by the Helms Amendment were, as characterized by the government, merely "indecent" it would qualify for First Amendment protection. In fact, however, such speech serves important purposes for those who participate in it, and thus warrants full and vigorous First Amendment protection.

For many Americans, the telephone is an irreplaceable and essential means of associating with, and expressing themselves to others in "highly personal relationships." Roberts, 468 U.S. at 618. This is particularly true for people in isolated communities, whether such isolation is geographical, cultural,

or the result of physical infirmity or disability.

For example, for many gay men and lesbians, the telephone may be the only viable means of reaching out to, talking with, socializing with, and even meeting other gay people. Feeling alone or cut off, fearing discrimination or violence in an often hostile world, or perhaps simply desiring to preserve their privacy and discretion (a choice valued by and precious to all citizens), such citizens have a particular need to use the telephone as a lifeline to others, a vital avenue for the exercise of their rights to associate with, seek the company of, and speak with other like-minded adults.[5/] For many gay people

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5/ Gay people have frequently confronted government attempts to impair their ability to associate. See, e.g., Gay Students Organization v. Bonner, 509 F.2d (continued...)

(as well as many others) the services provided by Petitioners offer an opportunity to engage in intimate adult communication while retaining a deeply desired and guarded anonymity. To require individuals to submit a request in writing to the telephone company -- revealing themselves to a mammoth and impersonal corporate institution -- prior to the delivery of such services would effectively deter people from engaging in admittedly protected speech.[6/]

5/(...continued)
652 (1974) (rejecting ban on lesbian and gay social events on campus because of both the political and expressive value of such social groups). The government has sought to prevent gay people's association, even when it involved only speech. Id.; see also Gay & Lesbian Students Assn v. Gohn, 850 F.2d 361 (8th Cir. 1988); Gay Student Serv. v. Texas A & M Univ., 737 F.2d 1317 (5th Cir. 1984, cert. denied, 471 U.S. 1001 (1985).

6/ In its reasoned and thorough analysis of the record before it in this case, the District Court pointed out that in the (continued...)

For the disabled and the ill, including people with AIDS or HIV infection, the telephone is a godsend, providing safe and easy access to information vital to their health and public health goals of disease prevention, to psychologically supportive companionship and entertainment, and to risk-free sexual satisfaction. Indeed, private, erotic communication over the telephone has also become an integral prophylactic measure for many of the "worried well" in both the gay and heterosexual populations who seek to abstain from direct sexual contact with

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6/(...continued)
government's survey of households which had used sexually explicit telephone services in the preceding month, more than 70 percent responded that they were not "very likely" to pre-subscribe and more than 60 percent responded that they were "not very likely or somewhat likely" to pre-subscribe. American Information Enterprises, Inc. v. Thornburgh, 742 F. Supp. 1255, 1263 (S.D.N.Y. 1990).

others. Even were this Court to conclude there is no right of association that protects ordinary social intercourse and acquaintanceship, a vision of the Constitution from which the Founders and most Americans would undoubtedly recoil, it would have to find that the possibility of intimate association that the telephone provides to the ill, the disabled, and the isolated is so socially redeeming and so personally significant as to warrant full constitutional protection.

Phone services of the kind made available by the information providers and electronic publishers in this case facilitate these important kinds of communication, expression, and association. As the record reflects, millions of callers find the services and the human contacts they make available to

be valuable sources of information, companionship, and entertainment, both sexual and otherwise.[7/] See Carlin Communications, Inc. v. FCC, 749 F.2d 113, 114 (2d Cir. 1984) (180,000,000 calls in one year). "[H]owever distasteful these materials are to some of us, they are nevertheless a form of communication and entertainment acceptable to a substantial segment of society; otherwise they would have no value in the marketplace." Marks v. United States, 430 U.S. 188, 198 (1977)

7/ "Gov. Ex. L. New York Telephone has projected that implementation of pre-subscription would result in a reduction of over 7,000,000 calls annually" in New York alone. American Information Enterprises at 1264 (emphasis added). The reduction of calls nationwide would, of course, be far greater still under the Helms Amendment.

(Stevens, J., concurring in part and dissenting in part).[8/]

D. The Services Provided by Petitioners Facilitate Speech that Serves a Significant Public Health Interest in the Context of the Current AIDS Crisis.

The National Academy of Sciences has declared: "Education is critical to controlling the spread of HIV/AIDS." National Research Council, National Academy of Sciences, "AIDS: Sexual

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8/ As Dean Geoffrey Stone of the University of Chicago Law School put it:

> [T]he very fact . . . that there is a vast market in our society for sexually explicit expression suggests that for many people, this type of speech serves what they believe to be, it may be amusement, it may be containment, it may be sexual stimulation, it may be fantasy, whatever it is, many of us believe that this expression is to our own lives, in some way, valuable. That value should not be overlooked.

Attorney General's Commission on Pornography, Final Report 1269 (July 1986).

Behavior and Intravenous Drug Use," at 26 (1989) ("NAS Report"). The services offered by Petitioners provide safer-sex education and information as to means of preventing HIV, or, in other formats, facilitate the exchange of such information.

In AIDS awareness and prevention efforts, it is vital that sex and sexuality be discussed "in clear, explicit language in the idiom of the target audience." Id. at 19. Although some may consider such discussions "indecent,"[9/] experts and health

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9/ On that score, it is no coincidence that Senator Jesse Helms, the sponsor of this restrictive legislation and its prior incarnation, struck down by the Court in Sable, has also characterized expert written "safe sex" education materials as "obscene." 133 Cong. Rec. S14203 (daily ed. Oct. 14, 1987). This Court might better heed the cautionary words of medical experts on the scientific importance of encouraging the flow of explicit discourse on AIDS and sexuality, (continued...)

professionals agree that only such information, coupled with the means of modifying behavior, can stem the transmission of HIV.[10/]

9/(...continued)
unimpeded by those who may be offended:

> AIDS education efforts provide a number of examples in which potentially effective prevention activities have become entangled in social conflicts that caused . . . a weakening of their message. Specific controversies have involved restriction on the use of explicit language in educational materials [and the perceived] conflict between providing scientific information and promoting particular moral values in AIDS prevention messages.

NAS Report, p. 26 (emphasis added).

10/ As the U.S. Government Accounting Office noted in a recent report on AIDS education:

> [One] step in health education is the provision of persuasive motivators for risk reduction. . . . Some research suggests an effective alternative -- positive motivators. Some motivators are symbolic, such as social approval for risk reduction
>
> (continued...)

Sexually explicit materials and discussions can play a critical and affirmative role in reinforcing the public health imperative to avoid unsafe sexual interaction with other people. At the Fourth International Conference on AIDS in Stockholm, public health experts described research demonstrating that sexually explicit materials presenting safer sex behavior in an affirmatively erotic manner were the single most successful motivator to abandon high-risk behavior in favor of low- or no-risk behavior. See J. D'Eramo, M. Quandland,

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10/(...continued)
and "eroticized" safer sex. . . . "Eroticizing is an effort to make safer sex more attractive so that people can more easily substitute safer sex . . . for the riskier sex . . . to which they may be more accustomed.

U.S. GAO, AIDS Education: Reaching the Population at Higher Risk, Sept. 1988, reprinted in AIDS Reference Guide, Section 1408, p. 9 (March 1988).

W. Shattls, R. Schuman, and R. Jacobs, "The 800 Men Project: A Systematic Evaluation of AIDS Prevention Programs Demonstrating the Efficiency of Erotic, Sexually Explicit Safer Sex Education on Gay and Bisexual Men at Risk for AIDS," summarized in CDC AIDS Weekly, p. 13 (Oct. 24, 1988).

Such means of behavior modification and avenues for safer sexually explicit exchanges are literally just what the doctor ordered. They are also just what many of the services threatened by the Helms Amendment provide. Many Americans, mindful of the potentially calamitous results of engaging in unprotected, intimate physical contact with others, have decided to abandon such activities. Seeking to protect both themselves and others, they have opted instead for the satisfaction afforded by engaging in

completely safe, private erotic conversation with like-minded others.

There is abundant direct and anecdotal evidence that many people use the variety of "adult" information programs and interactive conversational services as a form of "safe sex," instead of engaging in sexual release involving physical contact or the exchange of such body fluids as semen. For example, records of the San Francisco AIDS Foundation's safer sex workshops, counseling thousands of gay men in HIV prevention, reveal that participants spontaneously named "phone sex" as a safe sex outlet in every recorded session. Memo to San Francisco AIDS Foundation Staff from C. Frutchey, Assistant Director of Education (Mar. 10, 1989). Several leading AIDS prevention organizations issue safer sex guidelines

recommending phone sex as a form of safe sex.[11/]

Finally, coming full circle, these services provide sorely needed counseling and companionship to those who are HIV-infected, or who live with or care for someone else who is. As a particular manifestation of a more universal need for companionship, expression, and association, these needs are fully deserving of vigilant protection by this Court.

11/ See, e.g., Gay Men's Health Crisis, "Eroticizing Safer Sex," p. 26 ("using telephone sex services" listed as a "safer sex act"); see also Univ. of California, San Francisco's AIDS Health Project, "Suggested Guidelines for Sensible Sex" (Aug. 1986) (listing "phone sex" and "pornography" as "no risk sex"). Gay Men's Health Crisis (GMHC), based in New York City, is the nation's oldest and largest AIDS service organization, counseling thousands of people on the prevention of, and living with, AIDS.

Point II

BECAUSE BLOCKING TECHNOLOGY NOW EXISTS THAT WOULD ACHIEVE THE GOVERNMENT'S PURPORTED AND SOLE LEGITIMATE PURPOSE OF PROTECTING MINORS, THIS STATUTE IMPERMISSIBLY AND UNNECESSARILY BURDENS THE FIRST AMENDMENT AND PRIVACY RIGHTS OF USERS OF PETITIONERS' SERVICES.

The district court correctly held that "as a regulation aimed at the content of indecent telephone speech, the Helms Amendment's procedural mechanisms and substantive terminology must be scrutinized." American Information Enterprises v. Thornburgh, 742 F. Supp. 1255, 1261 (S.D.N.Y. 1990) (emphasis added). Such scrutiny reveals that the statute, by chilling and even banning speech and association over the phone, impermissibly burdens the protected

privacy expectations and First Amendment interests described in Point I.[12/]

Long ago, this Court recognized that forcing people to identify themselves as a prerequisite to the exercise of First Amendment rights may be an unconstitutional deterrent to such exercise. See NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 462 (1958) ("compelled disclosure . . . may

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12/ In addition to the arguments advanced below, Lambda adopts the other First Amendment arguments submitted to the Court by Petitioners. In particular, the Helms Amendment is vague and overbroad in its attempt to regulate so-called "indecent" speech among adults. It is an impermissible content-based restriction, which the government may not impose. Police Dept v. Mosley, 408 U.S. 92, 95-96 (1972) ("above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content"). Presubscription works an intolerable prior restraint on speech. As discussed below, the Helms Amendment is neither the least restrictive means of achieving, nor is it narrowly tailored to achieve, a legitimate government objective.

constitute a restraint on freedom of association").[13/] In evaluating whether such deterrence is constitutionally acceptable, the Court must consider whether the restriction at issue is necessary and narrowly tailored to serve a compelling governmental interest. As recently as the Sable case, the Court reaffirmed its longstanding recognition that, over the telephone, as in any medium:

> [t]he government may [only] regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest. . . . It is not enough to show that the government's ends are compelling; the means must be carefully tailored to achieve those ends.

13/ See also, e.g., Shelton v. Tucker, 364 U.S. 479 (1960); Talley v. California, 362 U.S. 60 (1960); Bates v. Little Rock, 361 U.S. 516 (1960).

109 S. Ct. at 2836 (emphasis added). Unfortunately, this legislation is neither "carefully tailored" nor the "least restrictive means" to accomplish its purported end of protecting children from exposure to "indecent" speech.

While some of the technology in this case may be new, this is not the first time courts have had to repel this kind of government effort to chill unpopular speech by requiring those wishing to exercise First Amendment rights to take steps to identify themselves. In Lamont v. Postmaster General, the Court rejected the equivalent of the presubscription scheme attempted here in the context of speech through the mails. 381 U.S. 301, 307 (1965). The Court held:

> We rest on the narrow ground that the addressee in order to receive his mail must request in writing that it be delivered. This amounts in our judgment to an unconstitutional abridgment of

> the addressee's rights. The addressee carries an affirmative obligation which we do not think the Government may impose on him. This requirement is almost certain to have a deterrent effect[.]

Id. at 307 (emphasis added).

The "presubscription" regime at issue in Lamont was closely akin to the needless requirement of a formal written request to the phone company that burdens free speech and association in this case. The Lamont Court rejected a rule whereby the post office would detain material characterized as "communist political propaganda," and would send to the addressee a card to be checked indicating a desire to receive such mail. Thus, before having equal access to the free flow of information over a purportedly neutral medium, an individual would first have to identify him or herself and take affirmative steps that could be

stigmatizing. Those who declined affirmatively to so identify themselves were denied access to the speech.

The Court struck down this restriction on communication, rejecting the notion that the government may "require[] an official act (viz., returning the reply card) as a limitation on the unfettered exercise of the addressee's First Amendment rights." Id. at 305. Underlying the Court's repudiation of such an affirmative burden on the access to speech and association was its recognition that:

> [T]he postal system . . . is now the main artery through which the business, social, and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare.

Id. at 305 n.3 (emphasis added). The Court observed:

> The United States may give up the Post Office when it sees fit, but

> while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our tongues[.]

Id. at 305 (quoting Milwaukee Pub. Co. v. Burleson, 255 U.S. 407, 437) (Holmes, J., dissenting) (emphasis added).

Today, it is the telephone that is "the main artery through which business, social, and personal affairs are conducted." Lamont, 381 U.S. at 305 n.5. Such communications are no less entitled to protection now than they were before.[14/] Indeed, because of the heightened privacy and personal control that telephone technology has brought, speech and association over the telephone are even more deserving of vigilance

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14/ It is significant that the Court did not decide Lamont on the ground that it affected "political speech." Id. at 307; consequently, the Court's direct repudiation of the presubscription process bears with full force on the statutory scheme challenged here.

against intrusive government control than the mails or other avenues of communication.[15/] Speech over the telephone between consenting parties is more intimate, more personal, and

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15/ In a long line of cases, the Supreme Court has made it clear that government may not, in the name of protecting minors against so-called "indecency," reduce "[t]he level of discourse reaching a mailbox to that which would be suitable for a sandbox," Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 74 (1983), or "in order to shield juvenile innocence . . . burn the house to roast the pig." Butler v. Michigan, 352 U.S. 380, 383 (1957).

While the Court has permitted some restrictions of "indecency" in the context of radio and network television, it has repeatedly made clear that "the special interest of the Federal Government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication." Bolger, 463 U.S. at 74. With the telephone, an ever more personal and directed technology, it is even more important that adults be able to engage in free, "adult" speech, association, and conversation. In light of the availability of blocking technology such important protected speech need not be sacrificed one whit.

infinitely more unlikely to fall on unwilling ears than speech over the air. Like the virtually unfettered free speech right to "use our tongues," id. at 305, our right to use our telephones must be secure and free of needless burden or restraint.

Nevertheless, as in Lamont, the government again seeks to impose an affirmative burden on those wishing to partake in constitutionally protected free speech and association. Not only is the government's attempt not a "sensitive tool" for achieving a legitimate purpose, Speiser v. Randall, 357 U.S. 513, 525 (1958), in light of more "narrowly tailored" blocking options available,[16/]

16/ The District Court pointed out that

> the government presents no evidence to contradict the proposition that a properly implemented version of New

(continued...)

it is an outright attempt to deprive adults of their right to speak freely and associate with other like-minded adults in their own homes, through the medium we all take for granted, the telephone.[17]

16/(...continued)

> York's current voluntary blocking system is adequately protective of children and is less restrictive than either a pre-subscription requirement or an independent billing mechanism

and that

> [i]n comparison with pre-subscription and independent billing, voluntary blocking enables a greater number of households to have access to [information providers'] services and places fewer burdens on [information providers] and listeners.

American Information Enterprise v. Thornburgh, 742 F. Supp. at 1264, 1265 (S.D.N.Y. 1990).

17/ Not only does the presubscription requirement chill would-be speakers and listeners in the exercise of their First Amendment rights to speak and associate, it also constitutes an unconstitutional prior restraint on such protected speech. "While [p]rior restraints are not unconstitutional per se . . . [a]ny system of prior restraint . . . comes to this (continued...)

CONCLUSION

The Helms Amendment and the presubscription requirement it contains violate the right of individuals to speak, associate, and converse freely

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17/(...continued)
Court bearing a heavy presumption against its constitutional validity." FW/PBS, Inc. v. City of Dallas, 110 S. Ct. 596, 604 (1990) (emphasis added), citing Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975). As the Court held in FW/PBS, Inc., "a scheme that places 'unbridled' discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." 110 S. Ct. at 605, Lakewood v. Plain Dealer Publishing Co., 108 S. Ct. 2138 (1988).

Here, where people are obstructed in their ability to engage in protected speech, where expression is chilled because phone company officials, under government command, are regulating undefined, so-called "indecent" speech and collecting a list of names susceptible to later abuse as well, there is a prior restraint on protected speech that must fall. The scheme at issue here is no less a prior restraint in practice just because the government has unconstitutionally delegated the restraint power to a heavily regulated, non-government actor. See Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982).

over their telephones in their own homes. Because the regime the government seeks to impose is a needless intrusion given existing voluntary blocking technology, we respectfully submit that this Court should grant the instant petition and strike down the statute as violative of the First Amendment and privacy rights.

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Respectfully submitted,

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